

Monomoy National Wildlife Refuge Q&A's related to the Refuge Boundary and Jurisdiction

How was the refuge boundary originally established?

- Monomoy NWR was established on February 10, 1944 through a Declaration of Taking ("DT") by the Secretary of the Interior (District Court of the United States for the District of Massachusetts, Misc. Civil No. 6340).
- The DT language includes a written description of the western boundary, which is defined by fixed latitude/longitude coordinates. The eastern boundary is described as the mean low water line, which is recognized as an ambulatory line.
- The DT document includes a map generally outlining those exterior limits and describing them as the "Limits of Area to be Taken."
- The National Wildlife Refuge System Chief's Approval memo and map (1938), the Service's Development Plan for the proposed refuge (1941), and a biological assessment report (1929) include the biological justifications for acquiring the upland, tidal and open waters within these exterior limits, emphasizing the value of the submerged aquatic vegetation to migratory waterfowl. The 1938 map was initially used to develop the outline for the "Limits of Area to be Taken."
- When Monomoy NWR was established it was one continuous land mass that stretched 8 miles, from Morris Island south into Nantucket Sound. In the 1700's it was a string of small islands and will continually break apart, merge, and reform.

Has the boundary changed over the years?

- Yes, the DT defined the eastern refuge boundary as an ambulatory boundary. The mean low water line has shifted considerably over the years and the entire landform has moved west.
- The westward migratory trend of the barrier system was recognized in the early memos and reports and by Congress in 1961 when it created Cape Cod National Seashore. The refuge's fixed western boundary and ambulatory eastern boundary was endorsed by Congress on the official 1970 map establishing the Monomoy Wilderness Area.
- The fixed western boundary and shifted eastern boundary was also surveyed by the Service in 2002 and approved by the District Court in *Associates of Cape Cod v. Babbitt* ("Babbitt").

What is the Service's justification for the recent boundary change to include 717 acres on Nauset/South Beach as part of the refuge? Is the Service annexing Town of Chatham property?

- The southerly end of the barrier island east of Chatham has been accreting south for decades. It has breached and accreted to the mainland; it is claimed as town land by Chatham. After gradually accreting south and migrating west, the barrier joined the refuge. Under both Federal and Massachusetts law, accretion by natural processes belongs to the upland landowner if title runs by an ambulatory boundary, such as mean low water.
- Section 5(a) of the Submerged Lands Act ("SLA") in 1953 granted to the States all "accretions" to coastal lands except those previously acquired or reserved by the United States (43 U.S.C. §1313(a), *CA State Lands* 457 U.S. at 282). So accretions to the 1944 eastern shore belong to the United States.
- When accretion and erosion shift the configuration of a beach, the property of the two (or more) landowners is divided. A breach formed by erosion and overwashes also separates property titles.
- The MA courts addressed accretion in a similar situation in the *Land Court and Lorosso* decision (1989 WL 1183738 (*Mass.Land Ct.*)).
- Approximately 717 acres that were formerly claimed by the Town of Chatham lands on Nauset/South Beach accreted and joined to lands in Monomoy NWR and now belong to the Federal government. Whether by erosion or principles of equitable division, ownership now is separated in the area of the breach. Ownership will continue to shift as the landforms change.
- The Service has not 'annexed' Town lands. Some formerly Town land merged with refuge land and then split apart through natural coastal processes, just as the refuge has gained and lost land across the refuge.

Why did the Service designate these 717 acres as part of the Monomoy Wilderness?

- The Monomoy Wilderness boundary is defined by mean low water. Since these acres accreted to the wilderness boundary and occur at or above mean low water, they now define the new wilderness boundary.

Under what authority does the Service claim jurisdiction in tidal and open waters within the refuge boundary? Doesn't the Colonial Ordinance assert that State jurisdiction applies?

- The DT includes language that states the land was acquired "...together with all accretion and reliction and all and singular water and riparian rights and other rights, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, vested in the United States of America..."
- All private and State's rights to lands and waters within the DT, including those covered by the Colonial Ordinance of 1641-1647, were eliminated as a result of the condemnation establishing the refuge. Federal law under the Supremacy Clause of the U.S. Constitution provides authority to the Federal government in maritime matters and has been recognized by the courts, including the U.S. Supreme Court and the Massachusetts District Court in *Babbitt*.
- The Commonwealth of Massachusetts challenged this right via litigation under the 1953 Submerged Lands Act (43 USC §1301 *et seq*). Massachusetts claimed that all of waters of Nantucket Sound, which included the waters west of Monomoy within the DT, were under their jurisdiction. However, the SLA did not relinquish submerged lands already reserved or acquired by the Federal government, regardless of its acquisition through condemnation. The Supreme Court held that the submerged lands west of Monomoy Point were not Massachusetts' internal waters at the time of the formation of the Union. Therefore, the submerged lands within the DT were already acquired as Federal land, were excepted from the SLA, and were subject to Federal jurisdiction and control when the Commonwealth received the surrounding lands in 1953.

Why is the Service not regulating some uses and activities on the refuge and allowing them to continue, when other uses and activities will be regulated?

- The United States has title to all lands and waters within the refuge boundary, and the Service has full authority to authorize or to deny activities within the refuge's boundaries, subject to the National Wildlife Refuge System Administration Act of 1966 and its amendments (16 USC §668dd *et seq.*), and the laws, policies, compliance requirements, and procedures which apply to any unit of the National Wildlife Refuge System.
- We acknowledge that active regulation by the Service of submerged and tidal lands has been limited; however, the authority to regulate by the Service has never been relinquished.
- At this time, the Service has determined that there is no compelling Service interest necessitating further regulation of fishing in open waters lying above the submerged lands within the DT. Included fishing activities are: demersal long line fishing; mid-water trawl fishing, hook and line/rod and reel fishing; lobster, crab, and whelk pot fishing; and hand-harvest of scallops. These activities do not cause disturbance to the submerged lands and are already regulated by other Federal and State agencies (e.g., the National Marine Fisheries Service and the Massachusetts Division of Marine Fisheries).
- There are other activities occurring in the open waters or submerged lands within the DT that are a management concern because of their impact on Federal trust resources. These activities will be further regulated by the Service. Some will be prohibited; others will be allowed with restrictions. Examples of prohibited activities are kiteboarding, jet skiing, mussel harvesting, or any activity that causes a disturbance to the submerged bottom. Examples of activities allowed, but with restrictions, include scallop and softshell clam harvesting, where only hand harvest methods can be used.